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U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [REDACTED] San Francisco

Date:

In re: [REDACTED]

IN DEPORTATION PROCEEDINGS

AUG 14 1997

APPEAL

ON BEHALF OF RESPONDENT: Nancy A. Fellom, Esquire
500 Sansome Street, Suite 614
San Francisco, California 94111

ON BEHALF OF SERVICE: Richard C. Cunan
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered without inspection

APPLICATION: Asylum; withholding of deportation

ORDER:

PER CURIAM. These proceedings were remanded to the Board by a decision of the Ninth Circuit dated August 1, 1996. By that decision, the Board has been directed to consider whether the respondent suffered persecution in his native Nicaragua and to clarify the import of his stay outside that country, prior to his arrival in the United States, on this Board's decision to deny him the relief that he has sought. The respondent seeks the relief of asylum pursuant to section 208(a) of the Act, 8 U.S.C. § 1158(a), or the withholding of his deportation to Nicaragua, pursuant to section 243(h) of the Act, 8 U.S.C. § 1153(h).

The basis for the respondent's claim that he is deserving of relief on the basis of having suffered persecution is that because of his strong family ties to the Somoza regime of Nicaragua, and his own personal views in opposition to the Sandinista regime, he was, at the age of 15, arrested by men who came to his home in an effort to forcibly recruit him into the militia. He was detained for a 1 month period. According to the respondent's brief, filed in response to the remand of these proceedings,

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"[a]lthough [the respondent] was not physically mistreated while in custody, every night he was subjected to the psychological torment of hearing other prisoners being mistreated. Fearful and alone and separated from his family, [r]espondent was afraid that at any moment the authorities would come and subject him to similar treatment." Because of the respondent's age, he was released on the condition that he report to the authorities twice a month, and, both he and his father were prohibited from leaving the city. According to the respondent's testimony, after his release, members of the militia continued to pressure him to join their ranks and he encountered hostility from his teachers at school who favored the Sandinista regime. However, within 2 weeks of his release, the respondent fled to Honduras where he remained for 3 years, with permission to study, until he came to the United States. The respondent testified before an Immigration Judge, in November of 1990, that he feared that if he were to return to Nicaragua he could be arrested and incarcerated because of continued Sandinista control of the government.

We first consider whether the respondent suffered persecution in Nicaragua within the meaning of the Immigration and Nationality Act. Persecution, in the context of the Act, requires that the perpetrator cause the victim suffering or harm on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. See Pitcherskaia v. INS, -- F.3d --, 1997 WL 342902 (9th Cir. June 24, 1997). The respondent has represented that he endured "psychological torment" and fear during his month long detention. In order to determine whether the respondent was persecuted, we must determine whether such torment and fear are sufficient to establish the requisite suffering or harm necessary to establish eligibility for the relief of asylum pursuant to section 208(a) of the Act. A review of the caselaw of the Ninth Circuit suggests that the treatment endured by the respondent does not establish that he suffered persecution within the meaning of the Act.

In assessing whether circumstances faced by an applicant for asylum constitute persecution within the meaning of the Act, a review of the caselaw of the Ninth Circuit suggests that, generally, in order for an applicant to establish that persecution occurred, the record must establish an account of physical harm or intimidation. See generally Surita v. INS, 95 F.3d 814 (9th Cir. 1996) (past persecution established where applicant's family home was looted by Fijian soldiers because her family was of Indian descent, with the looting soldiers telling her family members that they should "go back home" to India; where the applicant was robbed ten to fifteen times on her way to and from work by ethnic Fijians because she was Indo-Fijian; and where the applicant was compelled to quit her job of more than 10 years and was afraid to leave her home); Prasad v. INS, 83 F.3d 315 (9th Cir. 1996) (past persecution established where applicant was detained by ethnic Fijian soldiers on three occasions and was beaten and subjected to sadistic and degrading treatment because of his advocacy of Indo-Fijian worker's rights and his support for the Indo-Fijian led Labour party); Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988) (past persecution established where applicant was arrested three times, severely beaten on several occasions, and directly fired upon); and Lazo-Majano v. INS, 813 F.2d 1432 (past persecution established where applicant was singled out to be bullied, beaten, injured,

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raped and enslaved). The respondent in these proceedings was not physically harmed. But, remaining for this Board's consideration is whether the respondent endured persecution in the form of mental suffering.¹ See Fisher v. INS, 79 F.3d 955 (9th Cir. 1996), citing, Kovac v. INS, 407 F.2d 102 (9th Cir. 1969) (Congress's deletion of "physical persecution" from the Act indicates persecution may include mental suffering), see also, Pitcherskaia v. INS, *supra* (noting that human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as "curing" or "treating" the victims).

The respondent testified with regard to his state of mind during his month long detention at the hands of the Sandinista authorities. He stated that every night he heard people being mistreated and the sounds that he heard made him afraid that he too would be mistreated. He further testified that he felt "very sad, alone, and worried because [he] didn't know what could happen to [him]." Clearly, the respondent's detention caused him to be despondent and fearful; the question to be addressed, however, is whether those emotions, as suffered by a 15 year old, are tantamount to the mental suffering requisite to establish persecution for purposes of obtaining the relief of asylum.

The concept of mental suffering as an independent basis for establishing persecution in the context of the Act has only been minimally addressed in the caselaw of the Ninth Circuit. See Pitcherskaia v. INS, *supra*; Fischer v. INS, *supra*; Kovac v. INS, *supra*. Therefore, in order to determine whether the experience suffered by the respondent caused him mental suffering to an extent that he should be afforded relief pursuant to the Act, we will review this Board's precedential decisions. We note that in determining that applicants for relief had suffered persecution on account of a ground protected by the Act, this Board has on occasion relied, at least in part, on psychological abuse sustained by an applicant. In Matter of S-P-, Interim Decision 3287 (BIA 1996), this Board determined that the physical and mental torture suffered by the applicant was inflicted because of political views that had been imputed to him. In addition to suffering physical abuse, the applicant in that case had the barrel of a gun held to his head during interrogations and was threatened that he

¹We are not persuaded by the respondent's contention, made in his brief filed on June 17, 1997, that his claim is analogous to others in which a finding of past persecution was made, to wit, Prasad v. INS, *supra*; Gonzalez v. INS, 82 F.3d 903 (9th Cir. 1996) (wherein the applicant experienced multiple and continuing death threats, the marking of her house, the taking away of a ration card and means to buy inventory, harassment, and the taking of family property, all on account of political opinion); and, Rodriguez-Matamoros v. INS, 86 F.3d 158 (9th Cir. 1996) (wherein the applicant was severely beaten and threatened that she and her family would be burned alive and her sister was tortured and killed in her presence). The respondent also cites Vallecillo-Castillo v. INS, 91 F.3d 1313 (9th Cir. 1996), noting that a finding of past persecution was made based on evidence similar to that of the respondent. We note, however, that the opinion in that case was withdrawn pending the filing of an amendment.

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would be killed if he did not tell the truth. On other occasions, he was threatened with guns by drunken soldiers. In Matter of B-, Interim Decision 3251 (BIA 1995), this Board determined that the applicant suffered persecution on account of political opinion. In addition to noting the various forms of physical abuse endured by the applicant, the Board also noted that he had been subjected to sleep deprivation and that his "experiences during his detention and imprisonment must have been exacerbated by his ignorance of his father's fate [who was initially detained with him] and his separation from the rest of his family." Clearly, then, the Board has recognized the aforementioned persecutory methods, although not of a physical nature, as relevant to claims of persecution. See also Matter of Chen, 20 I&N Dec. 16 (1989) (noting psychological as well as physical abuses suffered by the respondent who was ultimately granted asylum on the basis of past persecution that he suffered on account of his family's religion). In the case now before us, we must determine whether the circumstances suffered by the respondent as a result of his detention, absent physical harm, rise to the level of persecution requisite to him being afforded relief pursuant to the Act. In making that determination, it is appropriate to consider the applicant's attitude toward that treatment. See Matter of Kasinga, Interim Decision 3278 (BIA 1996) (Rosenberg, concurring).

At the age of 15, either because of his political opinion or because of his family's ties to a former regime, the respondent was detained for a period of 1 month. No doubt, that detention caused him fear. However, the respondent did not provide any information which would have indicated that that experience, as unpleasant as it understandably may have been, caused him any long term adverse psychological effect. The respondent was not physically harmed during his detention. Given these facts, and although the respondent's detention may have exceeded a period typically characterized as brief, we do not find that the respondent suffered persecution in Nicaragua. See Prasad v. INS, 47 F.3d 336 (9th Cir. 1995) (4 to 6 hour detention and non-serious beating found not to constitute persecution); Mendez-Efrain v. INS, 813 F.2d 279 (9th Cir. 1987) (persecution not found where applicant had been detained and questioned for four days); but cf. Desir v. Ilchert, *supra* (detention combined with physical attacks can in some circumstances establish persecution). Further, to the extent the respondent departed from Nicaragua within 2 weeks of his release from detention, we do not consider the conditions of his release, that he not leave the city without permission and that he report to the authorities twice a month, to establish past persecution.

The respondent also claims to have a well-founded fear of persecution in Nicaragua. Because the United States Court of Appeals for the Ninth Circuit found unclear the Immigration Judge's ruling as to the import of the respondent's stay in Honduras, prior to his coming to the United States, on his application for relief, this Board has been directed to clarify our decision which affirmed the decision of the Immigration Judge. A review of the respondent's claim to harbor a well-founded fear of persecution in Nicaragua follows.

In his 1990 testimony before the Immigration Judge, the respondent contended that he feared arrest and incarceration in Nicaragua despite the change in government there since his

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1984 departure from that country. He explained that the political situation in Nicaragua remained unstable, that the Sandinistas continued to maintain influence in government, and that efforts were being made to destabilize the elected government of President Chamorro.

At the time of the respondent's hearing before an Immigration Judge, the regime that provided the basis for his fear of persecution was no longer in power. That regime had been elected out of office in a free and fair election. See Country Reports on Human Rights Practices for 1996, Committee on Foreign Relations U.S. Senate and Committee on International Relations U.S. House of Representatives, 105th Congress, 1st Session (February 1997) (hereinafter "Country Report"), at pp. 512-521; see also Acewicz v. INS, 984 F.2d 1056 (9th Cir. 1993) (the Board need not notify applicants before considering events that occurred before the deportation hearing and that were presented and argued before the Immigration Judge during the deportation hearing). We note, at this time, that the regime that provided the basis for the respondent's fear has not in the intervening 7 years returned to power. Country Report at 512. Consequently, the respondent has presented no basis upon which it could now be determined that he has a well-founded fear of persecution in Nicaragua. For that reason, there being no basis upon which to afford the respondent the relief of asylum, we need not reach the issue of what would have been the import of his stay in Honduras, prior to his arrival in the United States, on this Board's exercise of discretion had he been eligible for relief from deportation.

Because the respondent has not established past persecution or a well-founded fear of persecution if returned to his native Nicaragua, it follows that he has also failed to satisfy the clear probability standard of eligibility required for withholding of deportation under section 243(h) of the Act. See INS v. Stevic, 467 U.S. 407 (1984); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and, in the event of failure to so depart, the respondent shall be deported as provided in the Immigration Judge's order.



FOR THE BOARD